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CLERKUNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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U.S. DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
LONG ISLAND OFFICE

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 :
 UNITED STATES OF AMERICA, : 13-CR-00607 (JFB)
 :
 : 100 Federal Plaza
 v. : Central Islip, New York
 :
 PHILLIP F. KENNER, *et al.*, : March 1, 2019
 :
 Defendants. :
 -----X

TRANSCRIPT OF CRIMINAL CAUSE FOR ORAL ARGUMENT
BEFORE THE HONORABLE JOSEPH F. BIANCO
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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1 (Proceedings began at 1:41 p.m.)

2 THE CLERK: Calling case 13-CR-607, USA v. Kenner
3 and Constantine.

4 Counsel, please state your appearance for the
5 record.

6 MS. O'CONNOR: Madeline O'Connor, Diane Leonardo,
7 and Matthew Haggans for the Government. Also sitting with the
8 Government are Special Agents Josh Wayne and Mack Alietto
9 [ph.]. Good afternoon, Your Honor.

10 THE COURT: Okay. Good afternoon to all of you.

11 MR. TALKIN: Good afternoon, Your Honor. Sanford
12 Talkin for Mr. Constantine, who's seated to my right.

13 THE COURT: Okay. Good afternoon, Mr. Talkin; good
14 afternoon, Mr. Constantine.

15 MR. CONSTANTINE: Good afternoon, Your Honor.

16 MR. KENNER: Good afternoon, Your Honor. Phil
17 Kenner, defendant.

18 THE COURT: Good afternoon, Mr. Kenner. As you
19 know, we're here for I guess closing arguments on the
20 forfeiture aspect of the case. Are both sides ready to
21 proceed?

22 MS. O'CONNOR: Yes, Your Honor.

23 MR. TALKIN: Yes, Your Honor.

24 MR. KENNER: Yes, Your Honor.

25 THE COURT: All right. So again, I just want to

1 highlight that you don't have to go through everything that's
2 in your papers. This is really is an opportunity to summarize
3 your positions, highlight anything you want to highlight. I
4 hope -- I don't set time limits, but I'm hoping that, you
5 know, up to 20 minutes for each per -- each party should be
6 sufficient. That was my estimate just based upon the written
7 submissions. But I did want to note for the record obviously
8 in addition to the submissions by the parties I did receive a
9 series of letters, some of which came in and I asked the
10 Government to respond to, which they did in the February 11th
11 letter. And a number of letters have come in and some of them
12 came in and weren't docketed, but all of them now have been
13 docketed, at least that I'm aware of.

14 So we have a letter from Mr. Kaiser, we have a
15 letter from Mr. Pecca [ph.], we have a letter from CSL
16 Properties 2006, LLC, we have letters from Danske Bank, we
17 have letters DCSL parties, all on the issue of the
18 Government's attention to forfeit the resort and I just want
19 to clarify when I asked the Government obviously I'm reading
20 all these submissions. I asked the Government to respond to
21 submission and I also was hoping the Government would respond
22 today to some of the additional submissions that have come in
23 since their letter on February 11th.

24 I don't view these. The Government noted that
25 there's no right of intervention in a forfeiture proceeding

1 such as this. I don't -- this -- no motion has been made to
2 intervene. These are obviously interested parties who are
3 trying to advise the Court of some of the practical
4 ramifications of the forfeiture that the Government is
5 seeking. So I just view it as helpful to the Court to
6 under -- I obviously don't understand all the ramifications
7 and I'm not -- I don't know whether the Government fully
8 understands all the ramifications, so I -- and certainly part
9 of the complication is that there are conflicting views as to
10 what should be done and what the ramifications are. But I
11 think it's certainly helpful to me and I hope helpful to the
12 Government to understand in a complex situation like this what
13 the impact may be. So I just wanted to make sure, that's the
14 role of all of these letters and I do want the Government to
15 discuss that in its closing argument.

16 All right. It's the Government, so obviously you --
17 motion for forfeiture so I'll let the Government go first. Go
18 ahead. You can remain seated.

19 MS. O'CONNOR: The Government's reply memorandum
20 addressed primarily to money laundering forfeiture statute,
21 982(a)(1). This afternoon I'd like to highlight for the Court
22 the forfeiture statute pertaining to the wire fraud
23 convictions 981(a)(1)(C). Threshold issue before the Court is
24 whether the forfeiture money judgment sought by the Government
25 should be reduced in light of the Supreme Court's decision in

1 Honeycutt v. United States and the short answer is no.

2 For the defendant's conviction to wire fraud and
3 wire fraud conspiracy, money laundering conspiracy, defendants
4 must pay a forfeiture money judgment in an amount determined
5 by the Court and forfeit the previously restrain or seize
6 assets.

7 During the course of the forfeiture hearing and the
8 briefing, the Government provided ample evidence that
9 demonstrates the requisite nexus between the specific property
10 it seeks to forfeit and the crimes of conviction, as well as
11 the amount of the money judgment it seeks against each
12 defendant.

13 Kenner and Constantine both invoke Honeycutt and
14 Honeycutt does not affect their forfeiture liability in this
15 case. Honeycutt does not limit the forfeiture for the money
16 laundering convictions under 982(a)(1) because the money
17 laundering forfeiture statute requires the defendants to
18 forfeit all of the property involved in the money laundering
19 conspiracy. The forfeiture under 981(a)(1)(C) in this case is
20 also unaffected by Honeycutt because the Government is not
21 seeking to hold the defendants jointly and severally liable
22 for proceeds that they did not personally obtain.

23 Here the Government seeks to hold the defendants
24 individually liable for the total amount of proceeds because
25 as the ring leaders of the wire fraud conspiracy they each

1 obtained either directly or indirectly the proceeds of the
2 conspiracy.

3 The money laundering forfeiture statute that applies
4 in this case, 982(a)(1) contain significantly different
5 wording from the language of the narcotics forfeiture statute
6 at issue in Honeycutt, 852(a). In Honeycutt the Supreme Court
7 predicated its decision on the language of 853(a)(1) which
8 limits forfeiture for narcotics offenses to property that the
9 defendant obtained when he personally possessed or used.

10 Section 982(a)(1) by contrast contains no such
11 limitation and subjects a forfeiture of all property involved
12 in the money laundering offenses. Besides that, Honeycutt
13 concerned a defendant who is in no way like the defendants
14 here. The defendant in Honeycutt played a minor role in a
15 drug conspiracy and profited very little from it. In this
16 case, both defendants were the ringleaders of the money
17 laundering conspiracy and reaped significant financial benefit
18 from it.

19 And just as the defendants were the ring leaders of
20 their money laundering conspiracy, they were the ring leaders
21 of their wire fraud conspiracy and obtained the proceeds of
22 the wire fraud conspiracy either directly or indirectly. In a
23 post-Honeycutt decision, United States v. Ward, 2017 W.L.
24 4051753, Western District of Michigan, August 24, 2017, the
25 court found the defendant individually liable for the total

1 amount of the drug conspiracy's proceeds, reason that because
2 the defendant was the mastermind of the conspiracy he obtained
3 all of the proceeds even if indirectly.

4 The court stated that although the Government did
5 not establish that the defendant directly obtained the full
6 amount of the proceeds, the statute does not require the
7 Government to do so.

8 In reaching its decision, the court compared the
9 facts of that case to the hypothetical proposed by the Supreme
10 Court in Honeycutt which involves a farmer who masterminds a
11 scheme to distribute marijuana and earns three million a year
12 from the scheme and a college student recruited by the
13 mastermind who earns only \$3600 from delivering the
14 mastermind's drug packages.

15 The court in Ward reasoned that the defendant in
16 Ward was closely akin to the hypothetical marijuana mastermind
17 described in Honeycutt. In a very recent decision, U.S. v.
18 Bangeoff [ph.], 2019 W.L. 645050, Eastern District of
19 Virginia, February 14, 2019, the district court analyzed
20 Honeycutt and stated that Honeycutt bases its reasoning on
21 drawing a distinction between a mastermind and controls the
22 criminal operation and a lower figure who only has access to
23 and control over the smaller amount of tainted property
24 directly in his possession.

25 The court further stated that picking up on this

1 distinction lower courts have declined to apply Honeycutt in
2 cases where the defendant held a position of control in a
3 criminal operation. That decision cites Ward as well as the
4 Second Circuit's decision in SEC v. Metter, 706 Federal
5 Appendix 699, Second Circuit 2017, which also declined to
6 apply Honeycutt to a defendant who controlled the enterprise
7 at issue.

8 Much like the defendants in Ward, Bangeoff and
9 Metter, the defendants in this case are closely akin to the
10 hypothetical mastermind in Honeycutt. Neither defendant was a
11 mere low level co-conspirator who received a small payment for
12 his role in a scheme that was masterminded by someone else.

13 On the contrary, both Kenner and Constantine
14 masterminded and controlled their criminal enterprise in which
15 they stole millions of dollars from investor victims and
16 diverted those funds for their own benefit which is noted by
17 the Court in its Rule 29 and Rule 33 decision.

18 In fact, the decision states on page 2 that:

19 "The witness testimony and documentary evidence
20 adduced at trial sufficient established that Constantine
21 agreed with Kenner to participate in all of the
22 objections of conspiracy. In particular, bank records
23 show that both defendants routinely diverted third-party
24 funds intended to finance a Hawaii project Eufora in the
25 global settlement fund to pay for undisclosed personal

1 expenditures, such as in Constantine's case race cars,
2 rent and lawsuits unrelated to those investments."

3 Clearly, these defendants are not the type of low-
4 level conspirators that the Supreme Court in Honeycutt was
5 concerned about. And contrary to Constantine's assertion that
6 the money judgment the Government seeks should be reduced
7 under Honeycutt because he did not personally acquire all the
8 property, the facts in this case shall let Constantine
9 personally obtain the proceeds whether directly or indirectly
10 as a ring leader and controlling member of the conspiracy.

11 As outlined in the Court's Rule 29 and 33 decision,
12 Constantine reaped significant financial benefit from and
13 played a significant role in all three objects of a
14 conspiracy. The court states in its decision on page 52 that:

15 "The Hawaii project evidence showed a long-running,
16 multi-faceted scheme in which Constantine played an
17 integral role by (1) siphoning funds intended to finance
18 at development; (2) manufacturing of fraudulent pretext
19 for those payments; and (3) securing additional funding
20 for the Hawaii project by loan proceeds that he
21 subsequently diverted to his and Kenner's benefit."

22 Similarly, in addressing the Eufora object of the
23 conspiracy the court stated on page 53 that:

24 "As with the Hawaii project, the evidence at trial
25 demonstrated that Constantine routinely siphoned Eufora

1 investments to cover his personal expenses."

2 And in addressing a global settlement fund object of
3 the conspiracy on pages 58 and 59 of the decision the court
4 stated that there were "A plethora of personal expenses by
5 Constantine," using the global settlement funds and that
6 Constantine admits that he played a significant role in the
7 global settlement fund object of the conspiracy.

8 Now, because Constantine had partnered with Kenner
9 in their schemed conspiracies, there was a division of labor
10 in terms of each person's roles and duties in their overall
11 criminal venture. Kenner obviously received some of the money
12 from their frauds. But even if he -- every dollar didn't land
13 directly in Constantine's hands and someone to his partner in
14 crime, the proceeds nevertheless were obtained by both
15 defendants as they were the ring leaders and controlling
16 members of the criminal operation. In fact, the Supreme Court
17 in Honeycutt did not tie the act of obtaining to physical
18 position. In his hypothetical the court recognized that the
19 marijuana mastermind obtained drug proceeds even when he
20 directed his customers to pay, not him, but an intermediary
21 such as a college student. So in this case, Constantine
22 directly obtained any proceeds he did not directly obtain and
23 he certainly enjoyed the overall benefit from them.

24 In sum, there's no Honeycutt issue for the
25 forfeiture pertaining to the money laundering conspiracy in

1 this case because the money laundering forfeiture statute
2 requires the defendants to forfeit all of the property
3 involved in the money laundering conspiracy which includes the
4 property involved in, used to commit or used to facilitate the
5 money laundering conspiracy. In addition, there's no
6 Honeycutt issue for the forfeiture pertaining to the wire
7 fraud conspiracy charge in this case because the Government is
8 not seeking to hold the defendants jointly and severally
9 liable proceeds that they did not personally acquire.

10 Here, as the masterminds of their wire fraud
11 conspiracy, the defendants personally obtained all of the
12 proceeds, whether directly or indirectly, and personally
13 benefitted from these proceeds.

14 Your Honor, the Government has met its burden of
15 demonstrating the requisite nexus between the crimes of
16 conviction and the forfeitable assets, as well as the amount
17 of the requested money judgments and respectfully requests
18 that the Court enter orders requiring the defendants to
19 forfeit the previously seized or restrained properties and
20 impose money judgments in the amount of \$36,739,048.59.

21 And with regard to the filings by the third parties,
22 the Government's position is that the well-settled law is that
23 they cannot intervene in the sense that they cannot tell the
24 court the kind of language that can be included in the
25 preliminary order of forfeiture or that property cannot be

1 ordered forfeited if the Government demonstrated the requisite
2 nexus to the -- between the property and the crime, which is
3 what the Government has done in this case. Any issues that
4 they have with regard to their entries are involved in the
5 ancillary proceeding.

6 Now, there's no prejudice to having the third
7 parties wait to have their interests resolved at that time and
8 they've done demonstrated that anything that has occurred to
9 date or that the criminal proceedings, the forfeiture
10 proceedings or that the restraining order, the protective
11 order have harmed the operations of the resort. It's the
12 Government's position that if the property is ordered
13 forfeited that it will continue to be managed and operated in
14 the same manner that it has been. And they have not come
15 forward with any evidence that the resort is not functioning
16 well. And, in fact, Jowdy filed his letter stating that the
17 resort is meetings its sales goals.

18 So with that in mind, Your Honor, there's nothing
19 that -- to prevent the Court from ordering the preliminary
20 order forfeiture that was attached to its moving brief. Thank
21 you.

22 THE COURT: Well, just -- I want to focus on that
23 last point because --

24 MS. O'CONNOR: Yes.

25 THE COURT: -- I guess -- I don't understand. Even

1 if the Government has met its burden with respect to the nexus
2 and the forfeiture clearly you have multiple parties who are
3 suggesting that notwithstanding the resort has been operating
4 as a going concern that this next step by the court is going
5 to further complicate the entire financial situation and
6 jeopardize the ability for them to meet their debt
7 obligations, to get investors. You know, I don't understand
8 why the Government in its discretion as it relates to how it
9 seeks forfeiture would not want to consider those things. I
10 just don't understand that.

11 In fact, in a letter on February 20th, Ms. Martin
12 argued that one of the things that's going to complicate the
13 Government's path here is that if the property is in Mexico
14 and by a Mexican trust, the Government would have to go
15 through the Mexican government in order to seek forfeiture of
16 that. So that seems like there -- based upon what they're
17 citing that they're correct on that, right?

18 MS. O'CONNOR: It's true, Your Honor, although we
19 had no -- we had no reason to believe that we would not be
20 able to forfeit the property if the Court orders it
21 forfeitable and --

22 THE COURT: I know, but they're suggesting that this
23 could then be tied up for years. Years and years and years in
24 the Mexican government and that the Government in forfeiting
25 this property could be harming the very victims who the

1 Government in this case is trying to make whole and innocent
2 third parties who had nothing to do with this case.

3 So why wouldn't the Government want to consider all
4 those things? Have you ever met with them and tried to
5 understand what the ramifications would be? I assume the
6 Government doesn't understand every aspect of what the
7 implications would be of forfeiting the entire resort.

8 MS. O'CONNOR: Your Honor, we have --

9 THE COURT: Why is the Government so confident
10 "nothing -- everything is going to be just fine, nothing is
11 going to happen to that resort, trust us, we know what we're
12 doing" when you have all these parties who are suggesting that
13 there -- you know, could be major financial ramifications.

14 MS. O'CONNOR: Well, Your Honor, first and foremost
15 to address your point about the property being located in
16 Mexico, we did want to point out the interest -- the ownership
17 interests are held by domestic United States formed LLCs.

18 THE COURT: All of them?

19 MS. O'CONNOR: Well, the entities that we listed in
20 our preliminary order, forfeited the proposed order which are
21 the majority ownership, 99 percent ownership of that resort is
22 a one percent ownership by Jowdy. Now, granted, they're under
23 an umbrella of a Mexican LLC but that's what Mexican law
24 requires.

25 But the majority -- the ownership fo the resort is

1 held by domestic LLCs. Furthermore, we have spoken at length
2 with the bank and with the resorts about its operation. Now,
3 Jowdee filed a letter to Your Honor matter of weeks ago saying
4 that it met its sales goals. What we hear are speculative
5 concerns. There's no evidence that the resort isn't meeting
6 its goals. We understand that it's -- there are issues with
7 it, but there's no -- there's been no evidence demonstrating
8 that it's a direct result of the forfeiture proceeding and not
9 that it's related to something else, for example, generally
10 that sales are -- all over the world aren't doing as well as
11 they used to or that efforts have been made -- proper efforts
12 have been made to make -- to sell property down there. And
13 there's been no -- as far as we're aware the restraining
14 orders had no effect on the property in the four years. And
15 we're at the point, Your Honor, where if this property is
16 ordered forfeited we move to an ancillary proceeding. There's
17 no reason the Government can't reach a resolution with the
18 property owners.

19 But this is the only asset of value and the concern
20 is that these victims if they want to see any money this is
21 the asset that would provide it. So the Government does feel
22 very strongly about forfeiting the resort.

23 THE COURT: I know, but even -- there -- I think
24 they're suggesting also obviously they don't -- at least some
25 of them don't believe the Government as a practical matter --

1 it would be in the best interests to forfeit the resort. But
2 even assuming that's true, why aren't there issues with
3 respect to the language of the order itself, even if the
4 resort were forfeited, there could be provisions put in the
5 order that might address some of their concerns with respect
6 to how it would satisfy, you know, investors or other
7 people -- people going forward with respect to -- you know,
8 also could just be modifications of the order that would help
9 him, even if the property itself was forfeited. Have you
10 considered that?

11 MS. O'CONNOR: We had spoken with the bank and their
12 concern was that the language is that the Government will go
13 in and seize the resort. And we assured them we have no
14 present intention of doing so, which is what we convened to
15 the Court in a letter and that the protective order remain in
16 place and essentially that the resort would continue to
17 operate status quo, which as of now the evidence shows that's
18 been insufficient.

19 THE COURT: I know, but wouldn't -- are they asking
20 you to have that language put in the order itself, like -- I
21 know you put that in your letter, but maybe for purposes of --
22 you know, it might be important that that be in the order
23 itself. If the Government is saying that in a letter, why
24 wouldn't you be willing to have the court sign something to
25 say that so that anybody who's looking at the resort would see

1 that in a judge's order. I think that's -- that -- in my
2 experience it's more significant when it's in the order itself
3 than when it's simply a representation by the Government in a
4 letter.

5 MS. O'CONNOR: Your Honor, we can put something like
6 that in the order if that's what the Court would like. At the
7 time we put in the -- in the proposed order we hadn't spoken
8 with them about it. The complaints came thereafter and if the
9 Court orders a forfeiture of the property we can put in any
10 language that the Court deems appropriate.

11 THE COURT: Okay. I'm just going to request that
12 you try to hear all their concerns and after hearing their
13 concerns submit another order to the Court consistent with all
14 the Government's objectives, you know, any modifications you
15 can make to try to minimize any potential negative impact, the
16 operation of the resort to innocent third parties. Ms. Martin
17 suggested having a magistrate judge involved in trying to
18 assist you. You know, I can certainly have a magistrate judge
19 do that if everyone thought that was helpful. I don't know
20 what your view is on that. Do you think it would be helpful?

21 MS. O'CONNOR: Your Honor, I think we could attempt
22 to resolve it first --

23 THE COURT: Okay.

24 MS. O'CONNOR: -- and then if it rises to that level
25 where we need that intervention we can do that.

1 THE COURT: All right. Yeah, I was going to
2 suggest. You have a meeting. Hear them out. I understand
3 obviously you might get conflicting views but, you know, I
4 think it's important that you give this serious consideration
5 that there's not some unintended consequences that are going
6 occur that are going to be hard to undue. If something
7 happens, some adverse affect, it may be very hard to undue if
8 it's not anticipated and dealt with in the best possible
9 manner in the order itself, assuming the Court were to grant
10 it.

11 All right. So we'll talk at the end about the
12 timing of that. Let me hear from them, okay?

13 MS. O'CONNOR: Yes, Your Honor.

14 THE COURT: Go ahead, Mr. Talkin.

15 MR. TALKIN: Thank you, Your Honor. Picking up
16 where you left off very briefly about the Mexico property,
17 Mr. Constantine's position is that he wants the property to be
18 in the position so that any victim of this case and third
19 parties, but the victims will be in the best place to get
20 their money back. That's -- and in our papers and I think
21 previously to the court we've said as far as we're concerned
22 we'll do whatever we can relinquish any rights so that
23 happens.

24 But there's an important point to the Honeywell
25 argument that lies in the Mexico property and that's this, the

1 fact that we have a room full of lawyers here and some of the
2 victims here shows you that that's where the lion's share of
3 the money went. It eventually ended up there. It may be a
4 real amount. It may not be a real amount. We'll find out
5 someday.

6 But we also know where it didn't go and it didn't go
7 to Tommy Constantine. Now, that's an important factor. It
8 doesn't affect whether or not -- you know, we're here, we're
9 convicted of a crime, forfeiture is under Your Honor is
10 conducting an analysis under Gill. That's why you're doing a
11 forfeiture. That's not the point I'm trying to make. The
12 point I'm trying to make is that's an important concern in
13 forfeiture and under Honeycutt. It's dealing with Honeycutt.

14 I think our papers are very clear about where the
15 applicability of Honeycutt and the Government rightfully
16 focused a lot of their reply to the response on whether it
17 applies to money -- the money laundering statute 982. But I
18 just want to quickly talk about 981.

19 First of all, Your Honor, I do have to -- I believe
20 I -- since I argued this in my papers that only one circuit
21 had said that 981 Honeycutt is not applicable. In doing my
22 research last night just to see if any new cases came out,
23 this week the Eighth Circuit joined the Sixth Circuit as the
24 only circuit that said that the -- 982 does not apply to
25 Honeycutt or Honeycutt, should I say, does not apply to 981,

1 but the case for that is United States v. Peithman, P-E-I-T-H-
2 M-A-N, and that's 2019 W.L. 242825. I think I'm obligated
3 since I argued that to bring that to the Court's attention.

4 However, that's still now two circuits versus the
5 many other circuits I've cited that did find Honeycutt
6 applicable to the fraud's forfeiture statutes. So I don't
7 think that changes my argument at all, but it's certainly
8 something the Court needs to be aware of before you make your
9 decision.

10 The -- what I heard from the people was it's not
11 talking about the wire fraud forfeiture it's not the fact that
12 Honeycutt applies or doesn't apply, it's irrelevant to our
13 discussions because they're not seeking joint and several
14 liability. They're seeking liability in its entirety from
15 both, which I don't think legally makes sense. It's joint and
16 severable because if they got it from one, they're certainly
17 not entitled to get it from two. So they don't get to double
18 it. So it's clearly a joint and several liability in its
19 practicality.

20 Their argument about whether or not in trying to use
21 the example of Honeycutt and talk about whether we're
22 masterminds or not masterminds is not exactly how much of the
23 litigation has panned out. It's really what we're talking
24 about is what they received. I mean, Honeycutt very clearly
25 states or the Supreme Court in Honeycutt very -- from the -- I

1 think it's the first paragraph of the opinion says, look, the
2 purpose of the criminal forfeiture are to -- really, three.
3 Two that are applicable in this case. One, to essentially
4 disgorge defendants, convicted criminals of the undue gain
5 that they'd gotten from their fraud.

6 The second one, which is interesting because it goes
7 back to what we're talking about in Mexico is it's to make
8 sure that the victims of the crime get their money back to the
9 best of everyone's ability. That's really -- the third one
10 talks about criminal organizations, so it's not really -- that
11 purpose isn't really applicable here. But I think you need to
12 look at forfeiture, especially in the area of the Supreme
13 Court as the cases are coming out of -- you know, Honeycutt
14 did start -- did start the change of the forfeiture, how we
15 look at forfeiture.

16 And courts have taken it from the drug statute,
17 taken it to the fraud statutes, and unfortunately we haven't
18 had an opinion yet on the money laundering statute. And the
19 people correctly pointed -- excuse me, the Government. I'm
20 sorry. I'm in a trial in state court now, so it's a tough
21 transition. The Government correctly states that the language
22 is different. There's no question the language is different,
23 but the goal is the same and the goal is to not punish someone
24 more than they should be punished.

25 Now, that's not to say that punishment isn't

1 warranted. They are. The punishment is to the extent that
2 someone has ill-gotten gain and to the extent that it can help
3 get somebody back what they lost.

4 But the money laundering statute's different
5 language and it's pointed out that -- and the Government
6 points out in their papers the Bermudas case where it talks
7 about where the Second Circuit has said that the language from
8 covering substituted assets of the drug statute apply to the
9 money laundering statute, but the Second Circuit said that's
10 the only way it applies and that there is no -- it doesn't
11 alter the under -- underpinnings of the money laundering
12 statute, meaning 982.

13 But that statute is done by the Second Circuit pre-
14 Honeycutt and not in the context of recovering money from the
15 individual -- not in the context of recovering what the
16 individual defendant actually gained. That was in the context
17 of where does a money judgment or a substitute asset judgment
18 is that applicable to the money laundering statute and the
19 answer was yes, and the defendant argued no, for a lot of the
20 same underpinnings that are in the Honeycutt argument. But it
21 kind of came from the opposite angle where they obviously
22 approached. So I do not believe that that gives us any
23 precedential value as to how Honeycutt applies to money
24 laundering statute.

25 Unfortunately, in this case this may be the case in

1 the Second Circuit that we do someday have an argument in the
2 appellate court about whether Honeycutt applies to the money
3 laundering statute one way or the other. But even the case by
4 the Supreme Court recently having nothing to do with money
5 laundering but having to do with forfeiture as to the state of
6 Indiana, again, the Supreme Court has expressed its opinion
7 that forfeiture should be tied to what's actually gained. So
8 now I just want to move onto what's actually gained as far as
9 Tommy Constantine because --

10 THE COURT: Before you get to that I guess I don't
11 need -- I understand your argument but you -- I can start it
12 by saying, notwithstanding the differences in the statutory
13 language but why should the Court overlook that? I mean,
14 isn't that significant?

15 MR. TALKIN: Well, I'm not -- I'm not saying the
16 Court should overlook that.

17 THE COURT: So then how do you get around that one
18 statute?

19 MR. TALKIN: Well --

20 THE COURT: How do you get around that one statute
21 says obtained and the other says involvement? Why isn't that
22 significant --

23 MR. TALKIN: Well --

24 THE COURT: What you're arguing to me is even though
25 it says "involved in" I should interpret it as money that he

1 obtained but I don't know how you can read the term "involved
2 in" to mean that you have to have obtained it. I just don't
3 think you can do that. I don't understand.

4 MR. TALKIN: Well, I don't necessarily agree with
5 that -- I mean, disagree with that. But what I'm saying is,
6 Your Honor, in the -- in the larger context of where we're
7 going and you have -- you know, the Eighth Amendment is saying
8 that it -- that it's a -- it's improper to have this extensive
9 punishment. The Supreme Court has said it's improper. I
10 don't have a case, as you point out that the lang -- that
11 tells you that that language has been extended. But
12 Mr. Constantine is making the argument today that when this
13 is -- if this is reviewed that when you put it in the context
14 of duly unharsh punishment, when you put it in the context of
15 Honeycutt and the underpinnings of the purpose of forfeiture
16 that is quickly evolved into what I've talked about, that if
17 we don't make this argument, Your Honor, then we're not going
18 to have that opportunity for somebody to litigate it at a
19 later time.

20 I understand that the statute -- statutory language
21 is very different. I get that. But you know what? When they
22 started looking at 953 that statute -- that language was
23 different. And then the courts then analyzed 981. That
24 statutory language is different. This is just, yes, an
25 extension of the different language, but the underlying

1 concepts haven't changed and that's what I think is going to
2 eventually be looked at. And that's what I'm asking Your
3 Honor to foresee. I'm asking Your Honor to say, you know
4 what, that makes sense. And maybe I should analyze it from
5 that point of view. And there's not a case -- I understand
6 there's for sure not a case that says you should do that and I
7 don't believe from my research that I updated as recent as
8 last night that there's one that says you can. So what I'm
9 asking Your Honor to do is to analyze it from that point of
10 view.

11 THE COURT: All right. Are you going to go now to
12 what he obtained? I did see your papers. You do lay it out
13 with the help of the forensic accountant.

14 MR. TALKIN: Right, right. And then I just -- and I
15 think it's important because we talk about this kingpin and
16 mastermind. When you look at the amount of money and that's
17 when -- it kind of goes back to where I started as far as a
18 lot of the money ended up in Mexico, the money that was
19 shipped out to Constantine through the testimony here is
20 \$20,000 here, \$30,000 there, \$50,000 except for the one large
21 chunk which was the finder's fees money from Hawaii which
22 we've taken responsibility for in our account. In other
23 words, we're not looking to not take responsibility for what
24 we gained. The numbers are 2.4 million or something, two
25 point -- 2.2 million give or take. And that's not an

1 insignificant amount of money. We understand that we were
2 convicted of that crime and because of that we got money from
3 Hawaii for that.

4 But there's a lot of money here that was taken from
5 the players that had nothing to do with Constantine. Never
6 went through him, never touched him, and ended up in what's
7 called "with Jowdy" because, you know, we'll it Mexico, but
8 ended up there.

9 So to hold him responsible for that we believe, you
10 know, violates the Eighth Amendment as well as with the
11 finding in Honeycutt is.

12 Your Honor, I may be inaccurate on the exact amount
13 of numbers or how much money went back and forth, but it might
14 even be a less number, but clearly the number I'm talking
15 about is far below 30 million dollars.

16 THE COURT: I understand.

17 MR. TALKIN: And forensic accounting is in detail
18 does lay that out accurately.

19 THE COURT: All right. Thank you. All right.

20 Mr. Kenner, you're up.

21 MR. KENNER: Thank you, Your Honor.

22 MS. O'CONNOR: Thank you, Your Honor.

23 MR. KENNER: First, I just wanted to acknowledge
24 that I did hear Your Honor's concerns about the Cabo project
25 and the breakout of the equity to the different partners and

1 how it may affect the ongoing management --

2 MS. O'CONNOR: Excuse me, Your Honor. I'm sorry to
3 interrupt that although Mr. Kenner is here to represent
4 himself on his own behalf, we'd just ask the Court to remind
5 him that anything he says can be used against him at
6 sentencing.

7 THE COURT: You understand that, Mr. Kenner?

8 MR. KENNER: Yes, sir. I continue to.

9 THE COURT: All right. Go ahead. Thank you.

10 MR. KENNER: Thank you. The -- so I am very
11 cognizant of the fact that as Your Honor represents if the
12 Government were to forfeit the entire Cabo project that it
13 could throw into disarray some ability for any of the equity
14 shareholders at some point in time to actually recover some
15 portion of their investment or all of it. You know, to that
16 tune I couldn't agree more with some of the cases that I've
17 read that clearly lays out that innocent third parties who are
18 involved in transactions are not (1) part of the money
19 laundering transactions if they're an innocent third party in
20 the context that, you know, money was wired perhaps from my
21 personal bank account to, let's say, Mr. Kaiser's personal
22 bank account. He can't be involved in a money laundering
23 transaction unless the Government makes him a co-defendant.

24 But on that context I do think that the investment
25 LLCs that are held by my former clients should not be touched

1 and should not be put at risk to recover at some point in
2 time.

3 Now, I have read the paperwork that went in last
4 night I believe from John Kaiser and also from Michael Pecca
5 and I did corroborate some of those statements with paperwork
6 that went in from somebody refer -- one of the myriad of
7 attorneys who represent Mr. Jowdy. I think it's Mr. Souther
8 [ph.] or Souther. I apologize if I'm saying his name
9 incorrectly.

10 But if I could address those just kind of one by one
11 and just delineate the position I have with respect to what's
12 gone on, I do believe that Mr. Constantine's recent submission
13 where he represents something in the neighborhood of two
14 million dollars -- and I'll defer to the paperwork for what it
15 actually said -- it -- are funds that flowed through to
16 Mr. Constantine. And because there was no directed verdict on
17 the three objects of the conspiracy, I think it will be left
18 in Your Honor's hands to determine if paying Mr. Constantine a
19 hard-money fee like the 17 other hard money lenders we paid in
20 Hawaii, if his is part of a conspiracy and the other 16 were
21 not part of a conspiracy for some reason, it should be pointed
22 out that Mr. Constantine was one of two out of those 17 that
23 actually delivered a loan for us where the other 15 did not.
24 And my most recent February submission lays out the fact that
25 we as a group sued I think three or four of those entities for

1 someone in the neighborhood of a million dollars of fees that
2 we paid just like to Mr. Mr. Constantine and they did not
3 follow through.

4 The real money that we're discussing here in the
5 Hawaii project, Your Honor, is money that did go to Mr. Jowdy
6 and there's no equivocation about that. It's in the banking
7 records. But that money did not go to Diamonte Del Mar. That
8 money did not go to Diamonte Cabo San Lucas, regardless of
9 where the bank transaction took place. In fact, I think
10 Mr. Souther represents in one of his letters to the court
11 that -- if I may have a moment -- I think he represented that
12 Mr. Jowdy did not -- I think he says on page 3 of his January
13 letter to the court that Mr. Jowdy never agreed to borrow any
14 of the funds used to fund any portion of the down payment from
15 Kenner or anyone else personally. And I've have to agree with
16 him on that because the money that -- and if you review the
17 line -- the loan agreement that was signed with Mr. Jowdy that
18 was held in Mr. Kaiser's possession for, you know, upwards of
19 ten years before this trial that that loan agreement is a loan
20 to Mr. Jowdy personally. It was under advice of counsel that
21 we were told to write that loan agreement to Mr. Jowdy
22 personally. So regardless of where he used the funds on his
23 end behind his Chinese wall we would always be able to attach
24 to Mr. Jowdy.

25 And it should be pointed out to the Court that

1 without a forensic accounting of the funds that were loaned to
2 Mr. Jowdy through the Hawaii partners that loan today is worth
3 about 31 million dollars. Now, Mr. Jowdy is still a world-
4 class developer according to Mr. Souther's letter. His
5 project is running magnificently, notwithstanding the comments
6 in Mr. Kaiser's letter of yesterday. But as a result -- and I
7 think the Government a few months ago mentioned that Mr. Jowdy
8 receives a developer's fee somewhere in the neighborhood of
9 \$225,000 a month. That's money that certainly could go back
10 to these loans.

11 But, you know, the Government has taken a very
12 specific position since my June 24, 2009 proffer to the FBI
13 including Mr. Galliato [ph.] that Mr. Jowdy was not part of
14 any criminal activity and as such, you know, Mr. Jowdy if we
15 wanted to pursue him had to go after the loans in a civil
16 manner.

17 I do have for the court from Glen Murray, who is one
18 of the investors in the Diamonte project and one of the non-
19 named -- unnamed victims in the superseding indictment, an
20 original million-dollar judgment against Mr. Jowdy in Nevada
21 where Mr. Jowdy authenticated the loan agreement by which we
22 get -- lent him the money, it corroborated the loan agreement
23 that virtually every witness that you met in the courtroom in
24 2015 had previously verified. And I believe in the Court's
25 memorandum and order, docket 501, if I recall correctly, Your

1 Honor did confirm that Mr. Pecca on cross-examination
2 impeached himself and admitted that he did approve Mr. Jowdy's
3 loans through the Hawaii project and that his testimony he
4 gave to the Southern District of New York in 2011 to their
5 grand jury was, in fact, accurate really putting Mr. Pecca in
6 a difficult position, notwithstanding the fact that I would
7 enjoy nothing more than to see each of the investors get their
8 money back from this 17 years we've been dealing with
9 Mr. Jowdy and whatever other ancillary issues that came up
10 during the trial, Your Honor.

11 With respect to Mr. Kaiser's -- one last mention in
12 that is regardless of what money we sent to Mr. Jowdy, all of
13 the money we sent him was with the specific intent. I think
14 one of Mr. Pecca's letters prior to this a few years ago told
15 the court that CSL Properties Investment, LLC, had actually
16 given 2.3 million dollars to the Cabo San Lucas project, which
17 I concur. Mr. Jowdy was the one who put the final paperwork
18 together at two million dollars and that was just one of the
19 myriad of issues that Mr. Jowdy defrauded us all on at the
20 closing and that just months later when we discovered the
21 initial frauds we didn't try to fix one problem at a time. We
22 effectively tried to create a global resolution through
23 mediation and then through a series of civil litigations and
24 criminal litigation in Mexico.

25 Complimenting that, the Government is seeking to

1 forfeit Baja Ventures 2006, LLC, which is an LLC I established
2 with two investor friends of mine, Joseph Stumpel [ph.] and
3 Yuri Leftonin [ph.], neither of which were named in the
4 superseding indictment at any point in time.

5 Between the -- Mr. Stumpel and Mr. Leftonin, our
6 capital account registers 2.5 million dollars at Diamonte, but
7 in essence and according to the Government's own accounting
8 which I believe is Government forfeiture document 36, we
9 contributed to Baja Ventures 4.1 million dollars. That was a
10 1.6 million-dollar difference between what we contributed to
11 Mr. Jowdy and behind the Chinese wall that he decided to
12 contributed to any of his entities.

13 As a result of the 1.6 million-dollar difference,
14 Mr. Stumpel was forced to file both criminal and civil
15 litigation in Mexico against Mr. Jowdy to recover the
16 difference in those funds in concert with myself filing a
17 separate fund for all the lawsuit for all the investors.
18 Mr. Matese Nordstrom [ph.] filing a suit for \$400,000 for a
19 separate investment and Mr. Jowdy's former golf pro Bob Goudet
20 [ph.] filing a multi -- excused me, about a \$400,000 lawsuit
21 for unpaid loans from Mr. Jowdy.

22 The nexus of the 1.6 million-dollar lawsuit that
23 Mr. Stumpel had filed in Mexico was that John Kaiser had
24 actually filed a -- signed a testimonial in Mexico in support
25 of Mr. Stumpel's lawsuit which basically said that Mr. Kaiser

1 was aware that Mr. Stumpel had transferred 1.6 million
2 dollars. It did not say that he was part of the transaction,
3 that he participated in it or he was aware of it at the time.
4 It simply was called a testigo in Mexico and it's a signed
5 affidavit required by the criminal courts.

6 Well, once Mr. Kaiser who we found out pursuant to
7 his letter today is not very pleased with Mr. Jowdy
8 whatsoever, it only took him about 12 years longer than it
9 took me to find out Mr. Jowdy was doing inappropriate things
10 to all of us.

11 That being said, once Mr. Kaiser took his job in
12 Mexico in 2012 he immediately claimed to the Mexican court on
13 behalf of Mr. Jowdy that his name was forged on that document.
14 In 2014 that was represented to the court and to Your Honor by
15 Mr. Miskiewicz in a pretrial hearing that they were going to
16 register that as a forged document with Mr. Kaiser's name
17 forged on it.

18 Well, I guess unfortunately prior to trial I told my
19 trial counsel that we would have tremendous impeachment
20 material and Mr. Kaiser lying about a forged document because
21 on a 2012 FBI recording Mr. Kaiser's co-worker, Brian Berard
22 [ph.], was recorded confirming that he and Mr. Kaiser had
23 signed those documents and Mr. Kaiser himself had signed that
24 document in the Mexican courthouse verifying that it was not a
25 forgery and that Mr. Kaiser in order to get Mr. Stumpel's

1 lawsuit against Mr. Jowdy terminated, but he represented to
2 the FBI, the U.S. Attorney and then consequence to Your Honor
3 lying about a forgery now in multiple jurisdictions which seem
4 to have a large impact on the trial here with the signature
5 expert that was brought to us.

6 THE COURT: I just want to -- I don't mean to
7 interrupt you, Mr. Kenner. I'm going to give you the 20
8 minutes. I just want to you to know you have ten minutes
9 left. If you're going to talk about the trial I don't know
10 what you want to say on the forfeiture, but just -- I just
11 want you to know you have about ten minutes left, okay?

12 MR. KENNER: Thank you, Your Honor. I appreciate
13 that.

14 So the last issue with respect to Mr. Kaiser's
15 forgery problem is that he was contemporaneously found to be
16 lying in an Arizona court about five other promissory notes
17 that he allegedly did not sign. And it was email traffic
18 between himself and the third party that he had signed the
19 document for that verified that he was lying about those
20 forgeries.

21 The irony here in the Eastern District courthouse,
22 Your Honor, is that the U.S. Government recovered the
23 photocopy versions of the two agreements they claimed with
24 Mr. Constantine to have Kaiser's name forged on them. They
25 recovered them from my house, but they were photocopy

1 versions. If Your Honor recalls about a month before trial or
2 so Mr. Kaiser, lo and behold, turned over the original ink
3 versions to the Government that he had in his own possession
4 at his own home. So just as I suspected all along, those ink
5 versions of Mr. Kaiser's name allegedly being forged were
6 custodied at his own home for over ten years before trial. I
7 addressed some of the other issues in my February filing.

8 With respect to Mr. Kaiser, his letter, it raises
9 two interesting issues. One, Your Honor, I think he's -- he
10 had submitted some forged and fabricated documents to the
11 Delaware Chancery court in an effort to suggest that the Baja
12 Ventures equity all belongs to him. I would renew my request
13 to the Court to require an in-camera review of Mr. Kaiser's
14 '06 and '07 taxes, which would verify that Mr. Kaiser was not
15 paid back pay at the closing of the Hawaii deal and that the
16 money was for his friends and family million-dollar loan.

17 I would also renew my request to the court to ask
18 Mr. Kaiser to produce all of his '05 and '06 expenses that he
19 deemed to be part and parcel of the \$816,000 payment at trial
20 in lieu of those funds being returned to his friends and
21 family from the million-dollar loan. Neither of those are
22 going to show that Mr. Kaiser was honest or ethical with the
23 courts here, Your Honor. And as such these two documents that
24 purport that Mr. Kaiser owns the Baja venture as a third party
25 is going to show to the court that it's -- Mr. Kaiser has been

1 inaccurate once again about forged and fabricated documents
2 and now with me incarcerated and this forfeiture proceeding
3 trying to undermine that process.

4 Mr. Kaiser was present in January of 2010 when
5 Mr. Jowdy was deposed, which would have been three, four or
6 five days following Mr. Kaiser's acquisition -- final
7 acquisition of that property and with Jowdy, Jowdy's lawyers,
8 the investors' lawyers and three other investors in addition
9 to me, Mr. Kaiser didn't say a word about it. In fact, he
10 told this courtroom that I had ruined his life, which would be
11 a tall order if in fact Mr. Pecca -- or excuse me. Mr. Kaiser
12 had acquired a piece of property as collateral worth tens of
13 millions of dollars. It just doesn't comport.

14 Mr. Pecca's letter I received just a few hours ago.
15 I concur with Mr. Pecca that there's a lot of chaos that goes
16 on with this and the CSL property should not be forfeited in
17 this. Frankly, the -- if the tracking -- if the Government
18 had done their proper tracking on this -- on this case they
19 would see that all the funds that myself and my investors had
20 sent to Mr. Jowdy far surpass the 6.625 million-dollar deposit
21 that went onto the Cabo San Lucas property. Thus, none of the
22 funds that we gave Mr. Jowdy with intent should have ended up
23 in the capital accounts. There are hundreds -- there are --
24 excuse me -- there are millions of dollars that do not show up
25 in the capital accounts as a result of those issues with

1 Mr. Jowdy. So they are just out in the wind in funds that are
2 frankly either part and parcel to the 31 million-dollar loan
3 that I've offered to help the Government collect on behalf of
4 all of the Hawaiian investors that they've denied me twice
5 and/or it's part of individuals loans by other investors like
6 Mr. Murray, who has the judgment here in Nevada, or
7 Mr. Stumpel's unpaid loan in Mexico or Mr. Nordstrom's
8 multiple unpaid loans to Mr. Jowdy.

9 I mean, Your Honor, this case is a unique case that
10 throughout the trial the Government alleged that I was
11 stealing funds from my clients for my own benefit and clearly
12 the Government formed their theories without doing a forensic
13 accounting of the money. If they did, they would have
14 discovered that unless they indicted Ken Jowdy or Tim Garn
15 [ph.] or John Kaiser or all of them. There were almost no
16 funds obtained by Kenner, involved in or traceable to any
17 money laundering issues with respect to a co-defendant of
18 mine. Because the Government chose to ignore all the Jowdy
19 and the Kaiser frauds involved in the case and seek their
20 prosecution, the bank records prove that I received only about
21 \$100,000 of loan repayment from Mr. Kaiser through his U4
22 [ph.] stock sales and approximately \$400,000 that Mr. Garn's
23 private U4 stock sales also from documented loans documented
24 with bank records. Nothing more.

25 The Government as they know that they've represented

1 through Conterenis many times in the Second Circuit cannot
2 forfeit funds that were sent to an innocent third party. The
3 Government conceded many times during trial that Jowdy, Garn,
4 Kaiser were not co-defendants, were not co-conspirators. It
5 was their own concessions that made these representations to
6 the jury, you know. And the definitions that I think are
7 important in the case are that proceeds under the Oxford's
8 Tenth Edition states that it's "money obtained from an event
9 or an activity, possessed as having something as property or
10 owned, possession, a state of owning something, a thing
11 owned."

12 And during this process just as Mr. Talkin had
13 eloquently suggested that Mr. Constantine received a certain
14 amount of money through the alleged charges at trial and
15 convictions, I have as well and I believe the proper forensic
16 accounting would show in fact that, that I was repaid short-
17 term loan from Mr. Constantine within days of my fronting the
18 money to him. And the same from Mr. Garn.

19 As a result, you know, Your Honor is aware that
20 Conterenis case, which the facts were an insider trading case.
21 And in Conterenis it said you can't be ordered to forfeit
22 profits that are never received or possessed, again
23 referencing the definitions. Conterenis and consequently
24 Nicolo [ph.], which is a Second Circuit appellate case dealing
25 with kick-backs on fraudulent contracts it was -- Mr. Voight

1 had laundered money and bought jewelry with it. And there's
2 an excellent example used by the Supreme Court and many other
3 appellate courts where it effectively said if Mr. Voight
4 received \$500,000 in cash, put it in his house. That money
5 would be involved in his money laundering conspiracy. If
6 Mr. Voight had gone out and taken \$250,000 of it and bought an
7 automobile with it, the Government would be entitled to
8 forfeit that as traceable to the money laundering offense.

9 I concur with that. And in fact, in the Third
10 Circuit appellate court case Brown, which was a mortgage fraud
11 case, it was a -- it was dealing with criminal forfeiture
12 under 982 and it effective says that defendant cannot launder
13 money to an innocent third party like Jowdy or like Kaiser
14 with no money laundering benefit to the defendant. And that
15 effectively supports 2004 Hawaii loan that Mr. Kaiser had in
16 his possession for a decade, that Mr. Jowdy had verified in a
17 December 2010 Nevada courthouse as authentic contradicting
18 what the Government tried to apply during their theories.
19 Under the Brown ruling in the Third Circuit appellate court it
20 says that Honeycutt applies with equal force to 982(a) as it
21 does to Honeycutt under Title 21.

22 The last thing I would just suggest, and I think
23 this complements Mr. Talkin, is for an indication of where the
24 Second Circuit is headed the Court should look at the
25 Government in the Second Circuit conceding several cases in

1 U.S. Fuijmono, which is 2018 U.S. Appeal Lexus 1541. It was a
2 mortgage fraud scheme case in U.S. v. Gil Guerrero, which was
3 2018 U.S. Appellate Lexus 36066, which was also conceded by
4 the Government in light of Honeycutt in order to save
5 resources going forward.

6 Ultimately with the money laundering conspiracy
7 under 18 U.S.C. 1956(h) Jowdy, Garn and Kaiser were not deemed
8 to be co-defendants or co-conspiracies at trial. That's all
9 the funds that went to innocent third parties based on case
10 law cannot be part of forfeiture or money judgment under
11 982(a) like Brown and the Third Circuit. Their statuses were
12 all well thought out and I'm talking about Mr. Jowdy, Garn and
13 Kaiser. Their status is well thought out by the FBI agent
14 with all the evidence in his hand for six years before trial
15 and they can't move the goalposts now to suggest that any one
16 of those received ill-gotten gains because none of them either
17 benefitted myself or came back to myself or Mr. Constantine
18 according to his paperwork.

19 Again, I received almost none of the funds and they
20 were both documented as return of short-term loans through
21 banking records and I was the whistle blower on Ken Jowdy in
22 2007 when we found out what he was doing and what he wasn't
23 doing with our money. I documented multiple times the tens of
24 millions of dollars Mr. Jowdy diverted, embezzled, et cetera,
25 from us over the years. I know that his attorneys advocate

1 hard for Mr. Jowdy but, you know, we've -- I've outlined today
2 alone that Mr. Jowdy screwed the Baja Ventures capital account
3 out of 1.6 million dollars leading to more litigation. He
4 screwed the CSL properties which involves Mr. Pecca out of
5 \$300,000 in the original capital account agreement.

6 He stole 2.5 million dollars for his own capital
7 account and in his affidavit or declaration that he's now
8 submitted two times to this court in 2016 and 2019 he puts
9 together a false premise by which he received his 2.5 million-
10 dollar capital account. It's clearly disprovable with
11 Mr. Jowdy's own emails. I've outlined it several times and it
12 shows it again he's just trying to use revisionary history to
13 support the problem of the day.

14 I appreciate his high-paid lawyers from multiple law
15 firms across this country to stick up for him and other
16 friends and family that he brings in and writes letters, like
17 one of the other letters I saw just today but these are people
18 that I have done business with them. And perhaps Your Honor
19 only needs to look just a little bit further to see that
20 Mr. Kaiser who was fully aware of what Mr. Jowdy had done to
21 everybody by -- and gave testimony to it in 2009 in an
22 arbitration being very crystal clear about money he
23 specifically solicited from his friends and family to
24 participate in a 15 percent loan to Mr. Jowdy through the
25 Hawaii partners. It was -- there was no word vomit, like he

1 tried to produce in 2015 represented in the Court's M&O at one
2 point. It was crystal clear that Mr. Kaiser was aware of it
3 at all times. But when he fell on hard times personally after
4 being fully repaid from his Hawaii investments and his
5 California investments with banking records to prove it,
6 Mr. Kaiser took a job with Mr. Jowdy and decided to put his
7 head in the sand. His letter now outlines very clearly what
8 Mr. Kaiser has learned since 2012 where he outlines years and
9 years of more theft by Mr. Jowdy behind the back of the
10 investors, Mr. Jowdy reiterating the same mantra that he did
11 in his two -- January 2010 deposition that he would never pay
12 back money to any investors Kenner or otherwise because we
13 turned on him. Well, effectively, Your Honor, in Jan --
14 excused me, in early 2007 when I discovered Mr. Jowdy's frauds
15 I was the first one that turned on Mr. Jowdy when he offered
16 me a documented bribe and testified to it in his own January
17 2010 deposition of tens of millions of dollars to go along
18 with him in his protection. I declined and I opened up
19 everything to my investors. Since then we've been fighting
20 it.

21 Mr. Kaiser now had his own come-to-Jesus recognition
22 of this with Mr. Jowdy and has outlined the same type of back-
23 door non-third party schemes that I outlined to everybody in
24 the 19 plaintiff lawsuit in 2008 versus Mr. Jowdy to recover
25 the money and the two California 19 plaintiff lawsuits, et

1 cetera.

2 All of that being said, Your Honor, I think with
3 respect to money judgment and forfeiture the Government has
4 not proven a nexus to the funds that ended up in Baja Ventures
5 2006 LLC. Those funds, the 2.5 million dollars, clearly come
6 from Joseph Stempel and Yuri Leftonin and as I outlined it's
7 actually 4.1 million dollars. Mr. Jowdy just behind his own
8 Chinese wall when he set up the final paperwork did not put in
9 the full amount. It's been taken, stolen, misappropriated,
10 embezzled, et cetera.

11 THE COURT: Now, you're over the --

12 MR. KENNER: The C --

13 THE COURT: -- 20 minutes. I'm just going to ask
14 you to wrap up.

15 MR. KENNER: Okay. Yes, sir, Your Honor. And
16 ultimately the 2.3 million dollars that Mr. Pecca and the
17 other investors put in was also supposed to be recognized.
18 There's a February 19, 2006 letter that recognizes Mr. Jowdy,
19 which is altering the ownership percentages "for now," in
20 order to satisfy some lien closing arrangement and that it
21 would be corrected after the fact.

22 So I concur with Mr. Kaiser -- excuse me -- with
23 Mr. pecca and all the other investors' angst and anxiety. I
24 also concur with Your Honor when you say that the management
25 of the DCSL project could cause problems and not allow any of

1 the investors to recover their funds. Could be a big problem.
2 But I would implore the Government to take a step back and
3 realize that they need to go through the same process they go
4 through with anyone and that's to indict to take to trial, to
5 convict and seek through forfeiture funds that they believe
6 are inappropriate to someone like Mr. Jowdy.

7 I'm not happy about that. I don't agree with it.
8 I'm offering to help the Government and conclude it, but with
9 respect to the money judgment forfeiture nothing in Baja
10 Ventures, no funds should have entered as Mr. Souther says,
11 the capital accounts in Mexico, nor do I believe they did.

12 And ultimately the funds that -- if the Court is
13 going to hold me responsible I should be held responsible for
14 funds that I benefitted from and I should be separated from my
15 ill-gotten gains as a result of the money transactions that
16 took place in this case.

17 THE COURT: All right. Thank you, Mr. Kenner.

18 If the Government wants to, I'll give you five-
19 minute rebuttal if you want to say anything.

20 MS. O'CONNOR: Briefly, Your Honor. Defendant
21 Constantine seems to suggest that a defendant can only be
22 liable for proceeds that he retained, rather than proceeds
23 that he obtained. But even Section 853(a) doesn't require
24 that the defendant have been shown to retain proceeds. That
25 simply isn't the case. In addition, he argues that proceeds

1 can only go to one or the other, but he doesn't cite any cases
2 which say that proceeds can only have been obtained by one
3 defendant or the other, but not both because that simply isn't
4 the law.

5 And Your Honor, we would again point the Court to
6 the hypothetical proposed by the Supreme Court which is not
7 the act of obtaining a physical possession. The Supreme Court
8 recognized that proceeds can be obtained even if it goes to
9 another member of the conspiracy if that individual was a
10 controlling figure in the conspiracy which both of these
11 defendants were.

12 THE COURT: All right. Go ahead. I'm sorry.

13 MS. O'CONNOR: And just also briefly on the point of
14 Bermudas, the Government's point in citing Bermudas as to
15 Section 982(b)(1), which is a statute that incorporates the
16 substitute asset provision was merely shown that in relying on
17 substitute asset provision in Honeycutt Supreme Court looked
18 to 853(p) as referring to the forfeitable property described
19 in 853(a) because in that case it was a narcotic statute and
20 that's forfeitable property.

21 But in this case forfeitable property is described
22 in 982(a)(1), which is what the Second Circuit recognized in
23 Bermudas. So rather than 853(p) looking at 853(a)(1) in this
24 case 853(p) would refer to 982(a)(1) to describe the
25 forfeitable property. And that was the point the Government

1 was making in its brief.

2 And as to Defendant Kenner's arguments, the
3 Government would just briefly point out that Defendant Kenner
4 repeatedly argues that the Hawaii money that went to Jowdy
5 went there as a loan. But as the Court recognized in its Rule
6 33 decision there's ample evidence that the investors did not
7 give permission to have their Hawaii investment money go
8 anywhere other than Hawaii. So it's completely irrelevant how
9 Mr. Kenner labels those transactions.

10 The rest of his arguments, Your Honor, are
11 adequately addressed by the Government's briefs.

12 THE COURT: All right. All right. Thank you.
13 Okay. So the matter is under submission by the Court. With
14 respect to the dialogue with the third parties, how long do
15 you think is a reasonable time to submit a letter to the
16 Court? I expect the letter would indicate hopefully that a
17 meeting or conference call where you hear out their concerns
18 for those lawyers who were here who are representing those
19 entities or individuals are, if there are individuals here
20 it's in advance of that meeting. You want to send the
21 Government, you know, language for example in the order of
22 forfeiture that if the Court were to grant it that you think
23 would be helpful in connection with avoiding some of the
24 consequences, I would suggest that you, you know, put those
25 types of suggestions in writing to the Government so they can

1 consider them even advanced -- in advance of this meeting or
2 conference call, whatever it might be.

3 So I would expect the Government to send a letter to
4 me indicating perhaps in light of those discussions we're
5 proposing the following modifications to any order of
6 forfeiture that the Court would enter to the one you had
7 previously submitted.

8 If you think after that initial meeting that having
9 a magistrate judge facilitate it would be helpful, you can put
10 that in the letter and I'll arrange for that to happen. So
11 it's basically just having that conference call or meeting and
12 then telling the Court and if you need more time you can put
13 that in the letter as well. So a couple of weeks. I don't
14 know. What do you you think?

15 MS. O'CONNOR: Two weeks?

16 THE COURT: Two weeks. Okay. So March 15th the
17 Government will submit a letter to the Court updating it on
18 that issue. All right. And then just to address a couple
19 of -- because I do want the remainder of the case to move
20 forward and Mr. Talkin, I know you're still on trial but
21 there's the issue of whether or not you wanted to put some
22 supplemental submission in on the ineffective assistance
23 claim.

24 MR. TALKIN: Yes, Your Honor. I understand that you
25 want us -- for it to be a few pages and we will do that.

1 THE COURT: How much longer -- how much longer do
2 you --

3 MR. TALKIN: Some in Monday.

4 THE COURT: Okay.

5 MR. TALKIN: Very -- let's say by the end of the
6 week, so --

7 THE COURT: Okay. Just want to give me a date for
8 that then?

9 MR. TALKIN: Yeah, I'm going to ask them -- it's
10 been multiple months, so I would ask for just three weeks
11 after the end of next week.

12 THE COURT: Okay. That's reasonable.

13 MR. TALKIN: For that letter.

14 THE COURT: March 29th?

15 MR. TALKIN: That's fine.

16 THE COURT: And then I'll give the Government a
17 chance to respond to that. You want ten days, is that enough?

18 MR. TALKIN: Yes, Your Honor.

19 THE COURT: So say April 9th and then as of
20 April 9th once I get the letter, once I believe I have any
21 questions based upon those submissions, then that motion will
22 be fully submitted for the Court and then -- I don't remember.
23 With respect to sentencing if you can remind me. I don't have
24 the docket sheet.

25 MR. HAGGANS: I think where we are on the sentencing

1 is PSR has been done. The objections have been filed. We do
2 not have a sentencing memorandum filed.

3 THE COURT: Did the Probation Department do an
4 addendum based upon your objections or not?

5 MR. HAGGANS: I do not believe so.

6 MR. TALKIN: We filed a response to the defense's
7 objections. I do not believe Probation has filed an addendum.

8 THE COURT: Okay. I'm going to have my deputy
9 contact the Probation office to see because that was a long
10 time ago, right?

11 MR. HAGGANS: It was, Your Honor.

12 MR. TALKIN: Your Honor, there may be -- it may make
13 sense, especially since Mr. Constantine has been out for re-
14 interview, on just -- not on the whole issue but if you're
15 going to speak to Probation if you would ask that, we'll
16 make that available.

17 THE COURT: Okay.

18 MR. TALKIN: Because it's probably information you
19 want to hear from them --

20 THE COURT: All right.

21 MR. TALKIN: -- in the sentencing.

22 THE COURT: Mr. Kenner, remind me. Did you put in
23 your objections as well to the PSR?

24 MR. KENNER: Your Honor, I just received from
25 Mr. Siegel the list of PSR correspondence just this week, so I

1 haven't had a chance to look at anything to submit an addendum
2 to the PSR.

3 THE COURT: Okay.

4 MR. KENNER: As you know, those --

5 THE COURT: When you say "addendum" you mean
6 objections?

7 MR. KENNER: Objections. I apologize, Your Honor.

8 THE COURT: That's okay.

9 MR. KENNER: Objections.

10 THE COURT: So you want --

11 MR. TALKIN: I'm sorry, Your Honor. My recollection
12 is that by I believe two counsels ago did submit a number of
13 objections to the PSR.

14 THE COURT: Right.

15 MR. TALKIN: I believe Mr. Siegel may have submitted
16 additional objections and the Government has responded to all
17 the objections that have been filed.

18 THE COURT: Okay. But I'll -- if Mr. Kenner -- he's
19 now representing himself. If he wants to potentially
20 supplement it, we have -- you know, we have other things going
21 on anyway. There's no harm giving him some time.

22 So Mr. Kenner, if you have any supplemental
23 objections on the PSR I would just ask you to do it by the
24 same date as Mr. Talkin, March 29th, okay?

25 MR. KENNER: Yes, sir.

1 THE COURT: And then want to anticipate what will
2 happen, you know, if Probation is going to do an addendum I
3 would want to get that first but then I think we'll have
4 another conference just to address as many objections, figure
5 out whether there's any type of hearing that would be needed,
6 if I had a co-hearing. And then subsequent that we could set
7 another date for sentencing going forward, okay? Does anyone
8 have any -- Mr. Kenner, I know Mr. Siegel submitted a list of
9 documents that you've gotten. I don't know if you -- do you
10 see that letter?

11 MR. KENNER: Just today, Your Honor.

12 THE COURT: Okay. So take a look at it. If you
13 think there's other things on there, you know, that you still
14 need I know you asked for all the pretrial transcripts but
15 after we -- I got off the bench last time it's a lot of
16 transcripts. I have to be mindful of the taxpayer dollars that
17 would go into giving you every transcript.

18 So what I'm going to ask you to do is -- and it can
19 be *ex par* -- it should be *ex parte*. Just if you want to write
20 a letter to me, if there's something in particular that you're
21 looking for in those transcripts, me and my staff might be
22 able to identify where it is because, as you know, you've sat
23 through a lot of those. A lot of them were non-substantive --

24 MR. KENNER: Correct.

25 THE COURT: -- and I don't want to have to have the

1 taxpayers spend all that money because there's one transcript
2 in particular -- even if it's a couple of transcripts. So
3 just write a letter to me just exactly what you're looking for
4 in those transcripts and I'd be willing to give you those
5 transcripts in particular, okay?

6 MR. TALKIN: Your Honor, may I just have a moment,
7 please?

8 THE COURT: Yeah. No, these are status conferences.

9 MR. TALKIN: Oh, okay. I --

10 THE COURT: I think we had 30 status conferences, so
11 this is before the trial.

12 MR. TALKIN: Okay. Because I have a ton of
13 transcripts --

14 THE COURT: No, no. He has all those, but --

15 MR. TALKIN: Okay.

16 THE COURT: -- if there's something that he wants to
17 document and so I'm just -- just put a letter in to me and
18 we'll see if we can figure out what date it was or dates it
19 was, okay?

20 MR. KENNER: Okay. Your Honor, there's a handful of
21 housekeeping items then so I'll just submit them also to you.

22 THE COURT: Yeah, that'd be great.

23 MR. KENNER: Okay.

24 THE COURT: All right. Anything else?

25 MS. O'CONNOR: No, Your Honor.

1 MR. HAGGANS: Was Your Honor intending to set a date
2 for the hearing on PSR matters? Government requests --

3 THE COURT: Sure.

4 MR. HAGGANS: Respectfully requests the Court to set
5 such a date.

6 THE COURT: Yeah, it's just a little bit hard
7 because -- I'll do it -- I don't know what the Probation
8 Department is going to say about the addendum but let's set a
9 date. So how about April -- wait. The -- April 9th is when
10 you're putting in --

11 MR. TALKIN: Correct, Your Honor.

12 THE COURT: -- Mr. Talkin?

13 THE COURT: Yeah. How about April 22nd at 1:30,
14 Monday, April 22nd. So this would be to address objections to
15 the pre-sentence report.

16 MR. HAGGANS: It's good for the Government, Your
17 Honor.

18 THE COURT: Mr. Talkin, is that okay with you?

19 MR. TALKIN: I'm sorry.

20 THE COURT: April 22nd at 1:30?

21 MR. TALKIN: It is, Your Honor. If it becomes a
22 problem --

23 THE COURT: Okay.

24 MR. TALKIN: -- I'll know in the next week. I
25 just --

1 THE COURT: And Mr. Constantine, I would want you to
2 be present at that because that would be substantive as well.

3 MR. CONSTANTINE: Whatever you say, Your Honor, I'll
4 be here.

5 THE COURT: Yeah.

6 MR. CONSTANTINE: I just needed a little notice to
7 buy the ticket.

8 THE COURT: Okay. Just make sure you -- before you
9 buy the ticket that it's going to be a firm date because I
10 don't want you to have --

11 MR. CONSTANTINE: Thank you, Your Honor.

12 THE COURT: All right. Have a good weekend.

13 PARTIES: Thank you, Your Honor.

14 (Proceedings concluded at 2:54 p.m.)

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1 I certify that the foregoing is a court transcript
2 from an electronic sound recording of the proceedings in the
3 above-entitled matter.

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7 Ruth Ann Hager, C.E.T.**D-641

8 Dated: March 4, 2019
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